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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

No. 712.

JOHN P. NICK and CLYDE A. WESTON,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITIONERS' REPLY TO GOVERNMENT'S BRIEF.

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This case cannot be fully considered by merely analyzing count one of the indictment, as suggested by respondent at pages 4 and 5 of its brief, because the indictment is divided into three transactions which are not related. Transactions two and three do not in any sense involve interstate commerce, and it was error to join the three transactions. Evidence admitted in support of transactions two and three was prejudicial to the petitioners. Transactions two and three were not proved to come within the purview of the act and therefore must result in a reversal of the whole case, regardless of any conclusion that may be reached as to the first transaction, because there was insufficient evidence to show that either transaction two

or three were violations, or that petitioners were guilty of violating the Anti-Racketeering Act in connection with these two transactions. In the case of United States v. Groves, 122 F. (2nd) (C. C. A. 2) 87, the Court held that where the jury was allowed, over objection, to consider together defendant's guilt of the violation of the mail fraud statute in respect to each of three frauds alleged, each was required to be proven. On failure to prove all, the conviction was reversed. United States v. Smith, 2nd Cir., 112 F. (2nd) 83; United States v. Koch, 2nd Cir., 113 F. (2nd) 982.

Furthermore, counts 1 and 2 cover the same transaction and thereby split a conspiracy, which is contrary to the decisions of this Court. There can be but one prosecution based upon a single conspiracy. United States v. Brace, 149 F. 874; Murphy v. United States, 285 F. 801; In re Snow, 120 U. S. 274.

Counts six and seven likewise split a single conspiracy.

I.

The respondent, under point 1 of its argument, at page 9 of its brief, contends that petitioners do not occupy an employee relationship with the employer. United States v. Hutcheson, 312 U. S. 219, effectually demonstrates the fallacy of the contention. Respondent overlooks the fact that the indictment shows on its face that petitioners were the bona fide representatives of Local No. 143, LATSE; that they not only negotiated for, but by virtue of the negotiations secured a wage contract fixing terms of employment, wages, hours and other working conditions which are legitimate objectives of a labor organization. The evidence shows that the members of Local No. 143 worked under this 1937 contract and collected wages thereunder. Therefore, it is clear that this case concerns wages and other

legitimate objectives of a labor organization as much, if not more, than does United States v. Local 807, 118 F. (2nd) 684. Furthermore, in the second transaction, counts 6 to 10 not only show that the corporation rendered the services contracted for, but did so at a price approximately one-third of that of its competitors. That a conflict exists between the case of United States v. Local 807, and this case is beyond cavil.

II.

Respondent's criticism under its point II is unsound, because the negotiating of a wage contract for moving picture machine operators in St. Louis has nothing to do with the interstate transportation of films. The Government's evidence showed that petitioners did not interfere with films; that the film exchange executives had no dealings whatever with the petitioners, and their operations were not interferred with (R. 112, 123, 127). Moreover, the petitioners contend that had film been interfered with in connection with a wage controversy concerning the moving picture machine operators, and had a strike resulted from such controversy, there still would have been no actionable interference with interstate commerce, because such would have been merely a remote and incidental restraint upon commerce which this Court has held, in both the Apex and Hutcheson decisions, is lawful conduct, for which a prosecution will not lie.

III.

Respondent assumes that Congress has the same powers with reference to curtailment of freedom of speech as the states enjoy, while, in fact and in law, Congress can make no law which abridges the freedom of speech, regardless of the nature of the abuse. That power was reserved by the states. A threat to strike is not and cannot constitute extortion.

IV.

Hearsay evidence is never admissible and it was peculiarly inadmissible in this case because of the exemption of labor unions under section 420 (d) of the act. Moreover, third party conversations held outside the presence of the petitioners were inadmissible, because they denied petitioners the right of confrontation of witnesses. The Court's charge cannot be supported under any theory so long as the labor policy of the United States is what the Norris-La Guardia and the Wagner Acts say it is.

V.

We respectfully submit that there is as much or more reason for the granting of a writ of certiorari in this case as there was in case No. 131, that is, United States v. Local 807. In our opinion, the reasoning at pages 10 and 11 of Government's petition, in cause No. 131, applies here.

The public importance of this question calls for an authoritative decision by this Court on the meaning of the language of the act. The interpretation of such language is raised and more fully presented by the instant case than in the case of United States v. Local 807, and the question of the meaning of this act and its application to the evidence in this case is so important that we analyze further in order that the Court may, at the very beginning, fully consider this point. The act reads as follows:

> "Any person who, in connection with or in relation to any act in any way or in any degree affecting trade or commerce or any article or commodity moving or about to move in the trade or commerce—
>
> (a) Obtains or attempts to obtain, by the use of or attempt to use or threat to use force, violence, or coercion, the payment of money or other valuable considerations, or the purchase or rental of property or pro-

tective services, not including, however, the payment of wages by a bona fide employer to a bona fide employee; or

(b) Obtains the property of another, with his consent, induced by wrongful use of force or fear, or under color of official right; or

(c) Commits or threatens to commit an act of physical violence or physical injury to a person or property in furtherance of a plan or purpose to violate subsections (a) or (b); or

(d) Conspires or acts concertedly with any other person or persons to commit any of the foregoing acts; shall, upon conviction thereof, be guilty of a felony and shall be punished by imprisonment from one to ten years, or by a fine of $10,000, or both."

Boiled down it means:

One who, **in connection with any act** affecting commerce,

(a) Obtains by force * * * money * * * not wages from employer to employee; or,

(b) Obtains property of another with his consent, induced by force or fear under color of official right; or,

(c) Commits or threatens physical violence or injury to person or property, furthering plan to violate sections (a) or (b); or,

(d) Conspires with others to commit any of the foregoing acts; shall be convicted, etc., etc.

The words, "in connection with or in relation to any act" certainly means an **actual act** (something done), not something **intended** to be done in the future, not something which **may or might be** done, not something **thought of.** While the law prohibits and punishes for criminal offenses **acts done** and **even some attempted,** never has the law

made one guilty for violation of law **thought of**, or even **intended.** There must be an **overt** act **committed.**

In the case at hand, to convict under paragraph (a) the Government must show that defendants "**obtained * * * by force * * * money, etc.,** IN CONNECTION **with an act affecting commerce**"; and that the defendants did not represent a bona fide labor organization and that they did not negotiate a wage contract for hours and wages for members of Local 143. That is to say, there must be a separate **act,** actually done, **affecting commerce,** other than and apart from the "**obtaining * * * by force * * * money, etc.**" The first paragraph of the law says, in effect (1), one who "**in connection with * * * an act affecting commerce,**" and paragraph two, lettered (a) says, "**obtains * * * money, etc. * * *.**"

The same analysis applies, of course, to each lettered section or paragraph of the law, that is, paragraphs (a), (b), (c) and (d).

It might here be pointed out to the Court that nowhere in all the evidence in this case can it be shown that any act on part of defendants, or anyone else, did in anywise **actually affect commerce.**

The following grammatical and syntactical interpretation of the act by Professor Frank Sullivan of St. Louis University was read to the Circuit Court of Appeals and is presented herein for the purpose of assisting the Court.

"Saint Louis University
Saint Louis, Missouri.

Department of English

May 14, 1941.

A grammatical and syntactical interpretation of:
Title 18, U. S. Code 420a. Interference with Trade

and Commerce by Violence, Threats, etc. Penalties. (June 18, 1934, c. 569.2. 48 Stat. 979.)

* * * * * * *

This piece consists of an introductory paragraph, which reads:

> "Any person who, in connection with or in relation to any act in any way or in any degree affecting trade or commerce or any article or commodity moving or about to move in trade or commerce * * *"

and of four other paragraphs, each of which is a predicate for the dependent clause, the subject of which is the word **who** in the introductory paragraph.

In its simplest terms, the law states that any person who does certain acts shall, upon conviction thereof, be guilty of a felony. These acts are enumerated in four paragraphs, lettered **a**, **b**, **c** and **d**, and are qualified by the introductory paragraph.

The subject of the law is **any person**. **Any person** is described by the adjectival clause, the subject of which is the word **who** in the introductory paragraph and the four-fold predicate of which is (as has been said above) the four paragraphs lettered **a**, **b**, **c** and **d**. But these predicates of the dependent clause are modified by an adverbial phrase in the introductory paragraph, which begins with the words **in connection with** and continues to the end of that paragraph.

In other words, the law states that the person to be guilty on this charge must do one of the acts specified in paragraphs **a**, **b**, **c** and/or **d**, and that this act so specified shall be performed **in connection with** an act affecting trade or commerce.

Frank Sullivan,
Asst. Prof. of English."

CONCLUSION.

It is, therefore, respectfully submitted that petitioners' application for writ of certiorari should be allowed as prayed.

Respectfully submitted,

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